

**\*\*Original filed 4/27/07\*\***

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RONALD EDWARD STEINER, JR.,	)	C 02-4829 JF (PR)
	)	
Petitioner,	)	ORDER GRANTING
	)	RESPONDENT'S MOTION TO
vs.	)	DISMISS
	)	
	)	
JOE MCGRATH,	)	
	)	
Respondent.	)	
	)	
	)	(Docket No. 3)

Petitioner, a state prisoner proceeding pro se, seeks a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court ordered Respondent to show cause why the petition should not be granted. Respondent filed a motion to dismiss the petition as untimely, and Petitioner filed opposition to the motion. The Court initially denied Respondent's motion to dismiss the petition without prejudice and directed Petitioner to submit evidence of (1) the date he learned of the AEDPA one-year filing period; (2) the date that Salinas Valley State Prison law library received the text of the AEDPA or materials explaining the AEDPA one-year filing period (or evidence that the law library did not have these materials before July 1998); and (3) the date Petitioner submitted his first habeas petition to the California Supreme Court to prison authorities for mailing.

1 Petitioner has filed supplemental evidence, and Respondent has filed a supplemental brief  
2 discussing equitable tolling. Based upon the Court's review of the papers and the underlying  
3 record, the Court now GRANTS Respondent's motion to dismiss the instant petition as  
4 untimely pursuant to 28 U.S.C. § 2244(d).

### 5 BACKGROUND

6 Pursuant to a plea agreement, Petitioner pled guilty to robbery (Cal. Pen. Code § 211),  
7 with enhancements for prior convictions, in the Napa Superior Court. On June 10, 1996,  
8 Petitioner was sentenced to twenty-five years-to-life in state prison. Petitioner did not appeal  
9 his conviction. Petitioner sought collateral relief by filing a state habeas petition in the state  
10 supreme court on January 19, 1999, which was denied on May 26, 1999. See Attachment to  
11 Petition at 8. Petitioner filed a second habeas petition in the state supreme court on September  
12 7, 2001, which was denied on December 19, 2001. Id. at 9. Petitioner then filed a habeas  
13 petition in the state appellate court on June 24, 2002, which was denied on June 28, 2002. Id.  
14 at 10-11. Petitioner filed the instant federal habeas petition on October 7, 2002.

### 15 DISCUSSION

16 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") became law on  
17 April 24, 1996, and imposed for the first time a statute of limitations on petitions for a writ of  
18 habeas corpus filed by state prisoners. Petitions filed by prisoners challenging non-capital state  
19 convictions or sentences must be filed within one year of the latest of the date on which: (A)  
20 the judgment became final after the conclusion of direct review or the time passed for seeking  
21 direct review; (B) an impediment to filing an application created by unconstitutional state  
22 action was removed, if such action prevented petitioner from filing; (C) the constitutional right  
23 asserted was recognized by the Supreme Court, if the right was newly recognized by the  
24 Supreme Court and made retroactive to cases on collateral review; or (D) the factual predicate  
25 of the claim could have been discovered through the exercise of due diligence. 28 U.S.C. §  
26 2244(d)(1). Time during which a properly filed application for state post-conviction or other  
27 collateral review is pending is excluded from the one-year time limit. Id. § 2244(d)(2).

28 The one-year period generally will run from "the date on which the judgment became

1 final by conclusion of direct review or the expiration of the time for seeking such review.” 28  
 2 U.S.C. § 2244(d)(1)(A). If a petitioner could have sought review by the state court of appeal or  
 3 the state supreme court, but did not, the limitation period will begin running against him the  
 4 day after the date on which the time to seek such review expired. See Smith v. Duncan, 297  
 5 F.3d 809, 812-13 (9th Cir. 2002) (limitation period began running day after time to seek  
 6 discretionary review of California Court of Appeal’s decision in the Supreme Court of  
 7 California expired, which was 40 days after the Court of Appeal filed its opinion) (citing Cal.  
 8 Rules of Court 24(a), 28(b), 45(a); Cal. Civ. Proc. Code § 12a).

9 Here, because Petitioner did not appeal his conviction, the conviction became final  
 10 when the time to file a notice of appeal expired, i.e., sixty days after Petitioner was sentenced  
 11 on June 10, 1996. See Cal. Rules of Court 31(a) (providing that appeal from criminal judgment  
 12 must be filed within sixty days after rendition of judgment or making of the order); Cal Rules  
 13 of Court 31(b) (providing that appeal from criminal judgment entered upon a plea of guilty or  
 14 nolo contendere must be filed within sixty days after judgment is rendered and must be in form  
 15 of a request for a certificate of probable cause as required by Cal. Penal Code § 1237.5). As a  
 16 result, petitioner’s “time for seeking” direct review expired on August 10, 1996. Accordingly,  
 17 Petitioner had until August 9, 1997 to file his federal habeas petition. The instant petition is  
 18 not deemed filed in this court until October 1, 2002,<sup>1</sup> over five years after the limitations period  
 19 expired. Absent tolling, therefore, the petition is untimely.

20 The one-year statute of limitations is tolled under § 2244(d)(2) for the “time during  
 21 which a properly filed application for State post-conviction or other collateral review with  
 22 respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2).  
 23 An application for collateral review is “pending” in state court “as long as the ordinary state  
 24 collateral review process is ‘in continuance’ – i.e., ‘until the completion of’ that process.”  
 25 Carey v. Saffold, 536 U.S. 214, 219-20 (2002).

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26  
 27 <sup>1</sup>See Saffold v. Newland, 250 F.3d 1262, 1268 (9th Cir. 2001) (deeming pro se federal  
 28 habeas petition filed when prisoner signs petition and presumably gives it to prison authorities  
 for mailing), vacated and remanded on other grounds, Carey v. Saffold, 536 U.S. 214 (2002).

1 Petitioner filed his first state habeas petition in the state supreme court on January 19,  
2 1999, which was denied on May 26, 1999. On September 7, 2001, Petitioner filed a second  
3 habeas petition in the state supreme court, which was denied on December 19, 2001. Id. at 9.  
4 Petitioner then filed a state habeas petition in the state appellate court on June 24, 2002, which  
5 was denied on June 28, 2002. Id. at 10-11. Petitioner is not entitled to statutory tolling for any  
6 of these petitions, as a state habeas petition filed after AEDPA's statute of limitations ended  
7 cannot toll the limitation period. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)  
8 ("[S]ection 2244(d) does not permit the reinitiation of the limitations period that has ended  
9 before the state petition was filed," even if the state petition was timely filed); Jiminez v. Rice,  
10 276 F.3d 478, 482 (9th Cir. 2001) (same).

11 Because statutory tolling does not render the petition timely, the Court must decide  
12 whether equitable tolling saves the petition. The Supreme Court has "never squarely addressed  
13 the question whether equitable tolling is applicable to AEDPA's statute of limitations," Pace v.  
14 DiGuglielmo, 544 U.S. 408, 418 n.8 (2005), but Ninth Circuit authority holds that the one-year  
15 limitation period may be equitably tolled because § 2244(d) is a statute of limitations and not a  
16 jurisdictional bar. Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1288 (9th  
17 Cir. 1997), cert. denied, 523 U.S. 1, and cert. denied, 523 U.S. 1061 (1998), overruled in part  
18 on other grounds by Calderon v. United States District Court (Kelly), 163 F.3d 530 (9th Cir.  
19 1998) (en banc), cert. denied, 526 U.S. 1060 (1999). Equitable tolling will not be available in  
20 most cases because extensions of time should be granted only if "extraordinary circumstances  
21 beyond a prisoner's control make it impossible to file a petition on time." Id. (citation and  
22 internal quotation marks omitted).

23 The Ninth Circuit has held that the petitioner bears the burden of showing that this  
24 "extraordinary exclusion" should apply to him. Miranda v. Castro, 292 F.3d 1063, 1065 (9th  
25 Cir. 2002). The petitioner must establish two elements in order to be granted equitable tolling:  
26 "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary  
27 circumstance stood in his way." Raspberry v. Garcia, 448 F.3d 1150, 1153 (9th Cir. 2006)  
28 (quoting Pace, 544 U.S. at 419); see Pace, 544 U.S. at 419 (petitioner's lack of diligence in

1 filing timely state and federal petitions precluded equitable tolling); Miles v. Prunty, 187 F.3d  
2 1104, 1107 (9th Cir. 1999) (“When external forces, rather than a petitioner’s lack of diligence,  
3 account for the failure to file a timely claim, equitable tolling of the statute of limitations may  
4 be appropriate.”). The prisoner also must show that “the ‘extraordinary circumstances’ were  
5 the cause of his untimeliness.” Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003) (citations  
6 omitted). Where a prisoner fails to show “any causal connection” between the grounds upon  
7 which he asserts a right to equitable tolling and his inability to timely file a federal habeas  
8 application, the equitable tolling claim will be denied. Gaston v. Palmer, 417 F.3d 1030, 1034-  
9 35 (9th Cir. 2005) (holding that where prisoner fails to show causal connection between self-  
10 representation on direct appeal or physical and mental disabilities and inability to timely file  
11 petition, district court’s finding that he was not entitled to equitable tolling where he had earlier  
12 filed a state habeas petition was not clear error).

13 Whether equitable tolling is in order turns on an examination of detailed facts. Lott v.  
14 Mueller, 304 F.3d 918, 923 (9th Cir. 2002). See, e.g., Stillman v. LaMarque, 319 F.3d 1199,  
15 1202 (9th Cir. 2003) (finding equitable tolling warranted where prison litigation coordinator  
16 promises the prisoner’s lawyer to obtain the prisoner’s signature in time for filing a petition,  
17 but then breaks his promise, causing the petition to be late). The prisoner must demonstrate  
18 reasonable diligence to have the benefit of equitable tolling in these circumstances. See  
19 Guillory v. Roe, 329 F.3d 1015, 1018 (9th Cir. 2003) (finding that petitioner was not  
20 reasonably diligent where he waited twenty-seven months to present unexhausted claims to  
21 California Supreme Court and seven months after that court’s decision to return to federal  
22 court).

23 In his opposition, Petitioner contends that he is entitled to equitable tolling because his  
24 attorney told him he gave up his rights to appeal by accepting a plea bargain. Petitioner claims  
25 that had he known he could have attacked his conviction by way of a writ of habeas corpus, he  
26 would not have filed a late petition. See Pet.’s Opp. at 1. Petitioner also maintains that the first  
27 prison to which he was sent - Salinas Valley State Prison (“SVSP”) - did not have any legal  
28 materials describing the “AEDPA” until July 1998. Petitioner argues that equitable tolling

1 applies because he had no knowledge of the AEDPA or any time limitations. Id. When he  
2 found out he could attack his conviction through a habeas petition, two and a half years after  
3 his conviction, there was “no ‘AEDPA’ knowledge or research available to him in the prison  
4 law library.” Id. at 2.

5 As a matter of law, Petitioner’s lack of knowledge of the deadline, and the failure of his  
6 attorney to notify him of his right to seek review of the underlying judgment by filing a habeas  
7 petition did not in and of themselves not make it “impossible” to file a federal habeas petition  
8 so as to warrant equitable tolling. See Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000)  
9 (ignorance of deadline does not warrant equitable tolling); Cantu-Tzin v. Johnson, 162 F.3d  
10 295, 299-300 (5th Cir. 1998) (pro se status did not warrant equitable tolling); cf. Hughes v.  
11 Idaho State Bd. of Corrections, 800 F.2d 905, 909 (9th Cir. 1986) (holding illiteracy of pro se  
12 petitioner not sufficient cause to avoid procedural bar).

13 Petitioner faults his trial attorney for failing to advise him of his right to appeal after  
14 Petitioner entered into the plea agreement. Ordinarily, a defendant who enters into a plea  
15 agreement has no appealable issues. Because issues must be exhausted on appeal or collateral  
16 review in state court before they can be presented in a federal habeas petition, there ordinarily  
17 would be no need for a trial attorney to advise such a defendant of his rights to federal habeas  
18 review. See 28 U.S.C. § 2254(b), (c). Thus, Petitioner’s trial attorney may have acted well  
19 within his professional obligations.

20 Because this is a non-capital case, Petitioner was not entitled to counsel in connection  
21 with his federal habeas petition. See Lawrence v. Florida, 127 S. Ct. 1079, 1085 (2007).  
22 The Supreme Court has held that in non-capital cases, an attorney’s miscalculation of the  
23 limitations period and negligence in general do not constitute extraordinary circumstances  
24 sufficient to warrant equitable tolling. Lawrence, 127 S. Ct. at 1085 (assuming without  
25 deciding that equitable tolling applies to § 2244(d)(2); in case where prisoner has no  
26 constitutional right to counsel, attorney miscalculation of limitations period not sufficient).  
27 Even assuming that the attorney was negligent, moreover, Petitioner’s argument fails because  
28 run-of-the-mill attorney negligence does not warrant equitable tolling of the limitations period.

1 See Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001) (holding that attorney negligence  
2 such as an attorney's miscalculation of the limitations period does not warrant equitable  
3 tolling). Because he has alleged no facts from which it may be inferred that his attorney in any  
4 way impeded or prevented him from filing a timely federal petition or lulled him into believing  
5 that such a petition would be filed, Petitioner's case is distinguishable from Spitsyn v. Moore,  
6 345 F.3d 796, 800-01 (9th Cir. 2003) (equitable tolling appropriate where attorney was retained  
7 to file and prepare petition, failed to do so, and disregarded requests to return files pertaining to  
8 petitioner's case until well after the date the petition was due). Accordingly, Petitioner is not  
9 entitled to equitable tolling for the alleged ineffective assistance of his defense counsel.

10 Next, Petitioner claims that the Salinas Valley State Prison law library did not have  
11 AEDPA materials available until July 1998. Petitioner argues that this constitutes both a basis  
12 for equitable tolling and "[an] impediment to filing an application" which warrants a delay in  
13 the commencement of the limitations period under § 2244(d)(1)(B). Pet.'s Opp. at 3.  
14 Petitioner cites to Whalem/Hunt v. Early, 233 F.3d 1146 (9th Cir. 2000) (en banc) (holding that  
15 the unavailability of materials in prison law library explaining the AEDPA may warrant  
16 equitable tolling or a delayed commencement of the limitations period pursuant to  
17 § 2244(d)(1)). The Ninth Circuit has held that a pro se petitioner's inability to access  
18 information about the statute of limitations deadline may warrant equitable tolling.  
19 Whalem/Hunt, 233 F.3d at 1148 (remanding case to district court for development of facts  
20 concerning whether AEDPA materials were unavailable in the prison law library and the legal  
21 significance of such a finding).

22 As noted above, Petitioner states that Salinas Valley State Prison did not have any legal  
23 materials describing "AEDPA" until July 1998. Petitioner alleges that he did not learn of  
24 AEDPA until January 1999, after which he promptly filed a state habeas petition in the state  
25 supreme court. Pet.'s Opp. at 1-2. In response to this Court's order directing Petitioner to  
26 submit supplemental evidence, Petitioner states that he first learned of AEDPA's deadline in  
27 January 1999. See Petitioner's Application to Show Evidence at 2. Petitioner has filed a note  
28 from the Pelican Bay State Prison law librarian, Ms. Griffin, in response to the Court's request



1 for information of the date that Salinas Valley State Prison law library received AEDPA  
2 materials. In Griffin's note to Petitioner, she states that she contacted John Burk, the Senior  
3 law librarian at Salinas Valley State Prison ("SVSP") by telephone. Mr. Burk told Griffin that  
4 AEDPA information became available at SVSP in the form of advanced sheets in January  
5 1997. See id., Exhibit B. In response to the Court's request for the date Petitioner submitted  
6 his first habeas petition to the California Supreme Court to prison authorities for mailing,  
7 Petitioner filed a copy of the first page of his state habeas petition, filed on January 19, 1999.  
8 See id., Exhibit A.

9 The Court concludes that these alleged circumstances, even viewed in the light most  
10 favorable to Petitioner, do not establish that Petitioner was unable to file a timely petition and  
11 that he acted with due diligence. Assuming that AEDPA materials were available at SVSP as  
12 of January 1997, the latest possible date according to Petitioner's supplemental evidence, the  
13 statute of limitations would likely commence in January 1997 and run through January 31,  
14 1998. Petitioner filed his first state habeas petition in January 1999, more than a year after the  
15 delayed start of the limitations period pursuant to 28 U.S.C. § 2244(d)(1)(B). Accordingly, this  
16 state habeas petition, filed after AEDPA's statute of limitations ended, cannot toll the limitation  
17 period. Ferguson v. Palmateer, 321 F.3d at 823. Moreover, as set forth above, Petitioner's  
18 alleged ignorance of AEDPA's deadline does not constitute a basis for equitable tolling. See  
19 Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000) (ignorance of deadline does not warrant  
20 equitable tolling); Cantu-Tzin v. Johnson, 162 F.3d 295, 299-300 (5th Cir. 1998) (pro se status  
21 did not warrant equitable tolling); cf. Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905,  
22 909 (9th Cir. 1986) (holding illiteracy of pro se petitioner not sufficient cause to avoid  
23 procedural bar).

24 Additionally, Petitioner has not demonstrated that he diligently pursued his claims. He  
25 fails to show how the factual predicate of his claim, that his counsel coerced him into pleading  
26 guilty, was not known to him at the time of his plea and sentencing in 1996. The Court notes  
27 that after he allegedly learned of the AEDPA statute of limitations requirements, Petitioner was  
28 able to file three different state habeas petitions between 1999 and 2002. See Gaston, 417 F.3d



1 at 1034-35 (ability to file prior state habeas petition can be factor in determining whether  
2 petitioner was unable to timely file a petition in federal court). Petitioner waited approximately  
3 fifteen months between the denial of his first habeas petition and the filing of his second habeas  
4 petition in the state supreme court. Petitioner then delayed approximately six months after the  
5 denial of his second state habeas petition before filing his third state habeas petition in the state  
6 appellate court.

7 Under all of the circumstances, the Court concludes that Petitioner has not established  
8 facts demonstrating that he is entitled to statutory or equitable tolling. Accordingly, the instant  
9 petition is barred as untimely pursuant to 28 U.S.C. § 2244(d)(1).

### 10 CONCLUSION

11 Respondent's motion to dismiss the petition as untimely (docket no. 3) is GRANTED.  
12 The instant petition is DISMISSED pursuant to 28 U.S.C. § 2244(d)(1). The Clerk shall  
13 terminate all pending motions and close the file.

14 IT IS SO ORDERED.

15 DATED: 4/27/07

  
JEREMY FOCHEL  
United States District Judge

A copy of this ruling was mailed to the following:

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